IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO (Ord.) No.25 of 2003.

Reserved on: 19.06.2007.

Date of decision: July 09, 2007.

Chinta Devi ***… Appellant***

Versus

Meena Devi & Anr. ***… Respondents.***

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] Yes

For the Appellant : Mr.M.S.Guleria with Mr.R.P.Thakur, Advocates.

For the Respondents : Mr.Yoginder Paul, Advocate.

Kuldip Singh, Judge.

Plaintiff Smt.Chinta Devi is in appeal against the judgment dated 26.12.2002 passed by learned District Judge, Mandi in Civil Appeal No.16/2000 remanding the case to the trial Court for fresh decision. The parties are referred in the same manner as in the trial Court.

2. The facts of the case, in brief, are that plaintiff filed a suit for partition regarding land comprised in *Khewat Khatauni No.74/83, Khasra No.86,* measuring 25-11-7 Bighas situated in *Mauza Samlehar, District Mandi*, H.P. claiming one third share in the suit property. It has been alleged that there is a house consisting of three rooms situate on the suit land denoted by Khasra No.86/1 which

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Whether the reporters of the local papers may be allowed to see the Judgment? Yes

was also constructed by one Chetu, predecessor in interest of the parties. She has claimed one third share in the land as well as in the house. It has been alleged that defendant No.2 is stated to have executed relinquishment deed of her share in favour of defendant No.1 which is wrong and illegal. On these facts, plaintiff filed a suit for separating her one third share in the suit property.

3. The suit has been contested by defendants by filing written statement and they have taken the plea that plaintiff has no *locus standi* to challenge the relinquishment deed. There is another building near the house stated in the plaint and that building has not been included in the suit, therefore, suit is for partial partition and is not maintainable. It has been admitted that suit land and house situated on the suit land is joint of the parties and each having one third share in it. The defendant No.2 has relinquished her share in favour of defendant No.1 and, therefore, defendant No.1 has two third share and plaintiff has one third share in the entire property. It has also been pleaded that suit has not been properly valued for the purposes of Court fee and jurisdiction.

4. The following issues were framed by the trial Court:-

(i) Whether the parties are joint owner in possession of the suit land? OPP

(ii) Whether the plaintiff is entitled for separate possession of the suit land by way of partition? OPP

(iii) Whether the suit is not maintainable in the present form? OPD

(iv) Whether the plaintiff has no locus standi to file the present suit? OPD

(v) Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction? OPD

(vi) Relief.

The trial Court passed a preliminary decree on 18.11.1999 by holding that plaintiff has one third share in the suit land comprising *Khata Khatauni No.74/83 Khasra No.86* measuring 25-11-7 Bighas and house situated thereon and the remaining two third share is owned by defendant No.1.

5. Defendant No.1 Smt.Meena Devi filed the appeal against the preliminary decree dated 18.11.1999. The District Judge has held that trial Court has not framed proper issues and re-framed issue No.3 as follows:-

Issue No.3(A): Whether there exist another building over the suit land consisting of three rooms and as to whether same was constructed by the plaintiff? OPP

Issue No.3(B): In case Issue No.3(A) is not proved whether the suit for partial partition is not maintainable? OPP

6. The District Judge ultimately remanded the case on 26.12.2002 by impugned judgment to trial Court for fresh decision with a direction to the trial Court to give opportunity to the parties to lead further evidence, if any on issues No.3(A) and 3(B). The liberty

was also given to defendants to apply for additional evidence or appointment of local Commissioner, if any, case is made out and the trial Court shall consider the application in accordance with law. The judgment dated 26.12.2002 has been assailed by way of appeal.

7. I have heard the learned counsel for the parties and have also gone through the record.

8. The learned counsel for the plaintiff has submitted that learned District Judge has erred in remanding the case. The parties were aware of the real controversy. The issues No.3 and 4 are enough to cover the controversy whether the suit is for partial partition or not. The defendants have taken objection that suit is bad for partial partition. They were aware of the controversy. The parties have led evidence and none of the party was taken by surprise. He has submitted that the District Judge has erred in framing issues No.3(A) and 3(B) and remanding the case to the trial Court.

9. On the contrary, learned counsel for the defendants has submitted that specific issue emerging from the defence of partial partition was not framed by the trial Court nor any issue was framed that there existed another building on the suit land. The absence of these issues has caused prejudice to the defendants and learned District Judge has rightly remanded the case to trial Court for decision afresh.

10. The defendants in their written statement have taken a plea that there existed three rooms building which is also joint and the plaintiff has not filed the suit for partition qua that building. The suit is for partial partition and is not maintainable. In replication, the plaintiff

has pleaded that three rooms house near the suit property was constructed by her, hence, question of partial partition or maintainability of the suit does not arise. Issue No.3 regarding maintainability of suit was framed by the trial Court and its onus was placed on defendants. A perusal of the written statement would show that maintainability of the suit has been pleaded only on the ground of partial partition and on no other ground. It is, thus, clear that the parties were aware of the real controversy regarding the maintainability of the suit. In Issue No.3 though the word 'partial partition' has not been used but in my opinion the question of maintainability in issue No.3 covers the plea of partial partition of defendants which has been taken by them in the written statement and parties were aware of this controversy and accordingly led evidence.

11. DW-1 Meena Devi has stated that the disputed house was constructed by her father and another cow shed comprising three rooms was also constructed by her father. She has stated that reference of cow shed has been given by her in her written statement. This part of her statement has been referred only to show that she was aware of the real dispute. In ***Nedunuri Kameswaramma Versus Sampati Subba Rao, [AIR 1963 SC 884],*** in Para-6, the Supreme Court has held as follows:-

> "… … … No doubt, no issue was framed, and the one, which was farmed, could have been more elaborate, but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their

> contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion. Neither party claimed before us that it had any further evidence to offer. We, therefore, proceed to consider the central point in the case, to which we have amply referred already."

12. In ***Kunju Kesavan Versus M.M.Philip & Others, [AIR 1964 SC 164],*** in Para-17, the Supreme Court has held as follows:-

> "… … … The parties went to trial, fully understanding the central fact whether the succession as laid down in the *Ezhava Act* applied to Bhagavathi Valli or not. The absence of an issue, therefore, did not lead to a mis-trial sufficient to vitiate the decision."

13. In ***Bhairab Chandra Nandan Versus Ranadhir Chandra Dutta, [AIR 1988 SC 396],*** in Para-6, the Supreme Court has held as follows:-

> "… … …The respondent's counsel submitted that since no issue has been raised on the question of alternative accommodation being available, the appeal may be remanded to the Appellate Court for evidence being taken and a

> finding rendered on the question whether the house in Ismail Madan Lane would meet the requirement of the appellant. We do not find any merit in this submission. Though formally no issue was framed, the parties went to trial and adduced evidence with this issue in mind and have drawn the attention of the Court to the existence of another house belonging to the appellant in Ismail Madan Lane and the said house being not vacant. There is, therefore, no need for the appeal being remanded for a finding on the question whether alternate suitable accommodation is available for the appellant."

14. In the present case, the Issues No.3(A) and 3(B) framed by learned District Judge are not necessary. In my view, the points covered by Issues No.3(A) and 3(B) are covered in the wider issue No.3 which is already on record. The learned counsel for the defendants has cited ***Devi Das Versus Mohan Lal [AIR 1982 SC 1213]; P.Purushottam Reddy & Another Versus Pratap Steels Ltd. [2002 (2) SCC 686]; Remco Industrial Workers House Building Cooperative Society Versus Lakshmeesha M. & Others [2003 (11) SCC 666 and Kunjan Nair Sivaraman Nair Versus Narayanan Nair & Others [2004 (3) SCC 277.*** These authorities are not applicable in the facts and circumstances of the case. Issue No.3 covering the objection of defendants regarding maintainability of the suit on the plea of partial partition has already been framed. The parties were alive to the controversy and they have led evidence.

Therefore the impugned judgment is set aside with a direction to the District Judge to decide Civil Appeal No.16/2000 in accordance with law. The appeal is accordingly allowed. The parties through their counsel are directed to appear before the learned District Judge on ***31st July, 2007***. No costs.

July 09, 2007*(soni)*

(Kuldip Singh)
Judge.